

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

D.S.,

Petitioner,

v.

SECRETARY OF HEALTH
AND HUMAN SERVICES,

Respondent.

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No. 10-077V

Special Master Christian J. Moran

Filed: November 16, 2012

Award of attorneys' fees and costs
on an interim basis, amount not
disputed

Scott William Rooney, Nemes, Rooney & McKindles, Farmington Hills, MI, former counsel for petitioner;

Thomas Gallagher, Gallagher & Gallagher, Somers Point, NJ, counsel for petitioner;

Darryl R. Wishard, United States Dep't of Justice, Washington, D.C., for respondent.

DECISION AWARDING ATTORNEYS' FEES AND COSTS ON AN INTERIM BASIS¹

D.S. ("Petitioner") seeks compensation pursuant to the National Childhood Vaccine Injury Compensation Program. See 42 U.S.C. § 300aa—10 et seq. (2006). Petitioner alleges that the human papillomavirus vaccine caused her to suffer from Guillain-Barré syndrome.

While the question of whether petitioner is entitled to any compensation remains pending, petitioner's former attorney filed a motion requesting an award of attorneys' fees and costs on an interim basis. Pet'r Appl'n, filed Sept. 21, 2012. Mr. Rooney seeks \$25,554.00 in attorneys' fees and \$6,921.88 in costs for a total award of \$32,475.88. The Secretary opposes on the grounds that a special master may not award attorneys' fees and costs until a judgment denying or awarding compensation has been entered, which has not occurred in the above-captioned case. Resp't Resp., filed Oct. 9, 2012. However, the Secretary states in the alternative, if an award of attorneys' fees and costs is authorized, she does not object to an award of \$31,000.00.

¹ The E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002), requires that the Court post this decision on its website. Pursuant to Vaccine Rule 18(b), the parties have 14 days to file a motion proposing redaction of medical information or other information described in 42 U.S.C. § 300aa-12(d)(4). Any redactions ordered by the special master will appear in the document posted on the website.

PROCEDURAL HISTORY

Petitioner retained attorney Scott Rooney to file a petition for compensation. Mr. Rooney did so on February 12, 2010. In the ensuing year, the parties participated in numerous status conferences with the undersigned and petitioner filed all pertinent medical records. See Pet'r Statement of Completion, filed Jan. 28, 2011. The parties submitted expert reports and continued to participate in status conferences with the undersigned. See exhibit 23 (report of Dr. Axelrod); exhibit A (report of Dr. Leist). On August 10, 2012, petitioner filed a brief in advance of a hearing scheduled for September 14, 2012, which was cancelled on August 23, 2012.

On August 15, 2012, Mr. Rooney notified the Court he had been terminated as petitioner's counsel and accordingly filed a motion to withdraw as counsel because petitioner wished to substitute counsel. On September 21, 2012, petitioner filed a consented motion to substitute Mr. Rooney with attorney Thomas P. Gallagher. On September 21, 2012, Mr. Rooney filed a motion for attorneys' fees and costs for his work on petitioner's case through that date. The Secretary filed a limited response.

ANALYSIS

Broadly speaking, there are two issues. The first is whether petitioner/Mr. Rooney should receive any attorneys' fees and costs at this time. The second question is assuming that some award is appropriate, what is a reasonable amount.

I. Should Petitioner Be Awarded Attorneys' Fees and Costs on an Interim Basis?

In Avera v. Sec'y of Health & Human Servs., the Federal Circuit stated that awards of attorneys' fees and costs on an interim basis are permitted in the Vaccine Program. 515 F.3d 1343, 1352 (Fed. Cir. 2008). Although the Secretary has argued that the circumstances in which Avera permits an award of attorneys' fees and costs on an interim basis are relatively narrow in other cases, the undersigned has disagreed with this argument. See, e.g., Nuttall v. Sec'y of Health & Human Servs., No. 07-810V, 2011 WL 5926131, at *2 (Fed. Cl. Spec. Mstr. Nov. 4, 2011) (citing cases).

A subsidiary question is whether an interim award should be made in this case, which is a matter of discretion. This question turns on the circumstances of this case.

To be eligible for any award of attorneys' fees and costs, petitioner must satisfy the standards for good faith and reasonable basis. See 42 U.S.C. § 300aa—15(e) (2006). Dr. Axelrod's report fulfills the reasonable basis standard in this case. Moreover, the Secretary does not contend petitioner brought the claim without a reasonable basis or in bad faith.

Another question is whether an award of attorneys' fees and costs should be made now, that is, on an interim basis. This issue involves consideration of various factors, including protracted proceedings, costly experts, and undue hardship. Avera, 515 F.3d at 1351-52; McKellar v. Sec'y of Health & Human Servs., 101 Fed. Cl. 297, 300-01 (2011) (discussing Avera factors).

The Secretary does not address whether attorneys' fees and costs are permissible here under the discretionary factors discussed in Avera. The undersigned concludes the circumstances where interim fees should be awarded as contemplated by Avera are present here. Accordingly, petitioner is entitled to interim attorneys' fees and costs.

II. What Is A Reasonable Amount of Attorneys' Fees and Costs?

The second issue is determining a reasonable amount for attorneys' fees and costs. Mr. Rooney seeks \$25,554.00 in attorneys' fees and \$6,921.88 in costs for a total award of \$32,475.88. The Secretary does not object to an award of \$31,000.00 for attorneys' fees and costs. In a later pleading, Mr. Rooney appeared to have accepted the figure of \$31,000.00 in attorneys' fees and costs as a reasonable sum.

A review of the material indicates that the components of Mr. Rooney's request are reasonable. He is awarded the amount to which the Secretary has not objected, \$31,000.00.

III. Conclusion

Petitioner is entitled to an award of interim attorneys' fees and costs. The special master determines that there is no just reason to delay the entry of judgment on interim attorneys' fees and costs. Therefore, in the absence of a motion for review filed under RCFC Appendix B, **the clerk of court shall enter judgment in petitioner's favor for \$31,000.00 in interim attorneys' fees and costs.** The amount shall be paid in a check made out to Mr. Scott William Rooney and petitioner jointly. Pursuant to Vaccine Rule 11(a), the parties may expedite entry of judgment by filing a joint notice renouncing the right to seek review.

The Clerk's Office is instructed to mail a courtesy copy of this decision to Mr. Rooney.

IT IS SO ORDERED.

s/ Christian J. Moran
Christian J. Moran
Special Master